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No. 1136

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In the Supreme Court

of the

United States

October Term 1968

GLENS FALLS INSURANCE COMPANY,

Petitioner,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

Brief of Respondent
State Farm Mutual Automobile Insurance Company
In Opposition for Writ of Certiorari

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INDEX

	Page
OPINION BELOW	1
THIS COURT HAS NO JURISDICTION	2
STATUTES INVOLVED	4
QUESTIONS PRESENTED	6
STATEMENT	6
ARGUMENT	7
CONCLUSIONS	9

INDEX OF AUTHORITIES

CASE AUTHORITY: *Page*

Colbrese v. National Farmers Union Prop. & Casualty Co. (1967), 75 S.Ct. 850, 349 U.S. 458, 99 L.ed. 1231 7

Ellis v. Dixon (N.Y. 1955), 75 S.Ct. 850, 349 U.S. 458, 99 L.ed. 1231 3

Safeco Ins. Co. of America v. Northwestern Ins. Co. (1963), 142 Mont. 155, 383 P.2d 174 9

State ex rel. City of Livingston v. State Water Conservation Board (1958), 134 Mont. 329, 215 P.2d 966 7

Valier Company v. State (1950), 123 Mont. 329, 215 P.2d 966 8

OTHER AUTHORITY:

Rule 19(a), Supreme Court of United States Rules 2

Rule 23(f), Supreme Court of United States Rules 2

Rule 34, Montana Rules of Appellate Civil Procedure 3-5

Section 53-109 R.C.M. 1947 4

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OPINION BELOW

The judgment rendered by the Montana District Court and the opinion of the Montana Supreme Court are set forth in Petitioner's brief. The opinion of the Montana Supreme Court has not yet been reported.

THIS COURT HAS NO JURISDICTION

Before the Supreme Court of the United States accepts jurisdiction on a writ of certiorari of a State Court, there must be a federal question of substance involved, *Rule 19(a), Supreme Court of the United States Rules.* Petitioner in his brief must also set forth the following information: the manner in which the question was raised; the method of raising the question; the way it was treated by the state court; and the reference made to the federal question by the state court, *Rule 23(f), Supreme Court of the United States Rules.*

In the instant case the record clearly shows that no contention was ever made that a federal question was involved in either the State District Court proceedings or on the appeal to the Montana Supreme Court. The only question presented in either court was the validity, construction and enforcement of the three Montana insurance contracts, in light of applicable Montana law. Montana law was applied and governed the construction of the contract. *No* federal question was advanced. The first mention of there being a federal question involved was the reference made in Petitioner's brief to a statement made by its counsel on oral argument to the Montana Supreme Court. At no time was the question ever presented in the briefs of the respective parties.

Conceding that Petitionr mentioned a federal question in oral argument, we contended that such a state-

ment fails to properly raise a federal question, which would invoke the jurisdiction of this Court.

In *Ellis v. Dixon* (N.Y. 1955), 75 S.Ct. 850, 349 U.S. 458, 99 L.ed. 1231, this court held that there was no adequate showing that a federal question was properly presented and therefore refused to assume jurisdiction on a writ of certiorari. We submit that what the court stated at p. 1236 is controlling of this case, wherein they noted:

> "This court has often refused to decide constiutional questions on an inadequate record (citing cases). In the circumstances of this case, we prefer to rest our decision on the ground that we lack jurisdiction. For if we could not ourselves decide on this record the constitutional issues tendered, we consider that by the same token the New York Court of Appeals was entirely justified in refusing to pass on them, and that we should therefore regard its denial of leave to appeal as resting on an adequate non-federal ground."

If the petitioner seriously felt that a federal question of substance was properly presented to the Montana Supreme Court and that the Montana Court overlooked the question in its opinion, it should have petitioned for rehearing or provided for in *Rule 34 of the Montana Rules of Appellate Civil Procedure,* which provides in part:

> " * * * A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in con-

flict with an express statute or controlling decision to which the attention of the Court was not directed * * *."

By failing to give the Montana Supreme Court the opportunity to correct the error, if any, made in its opinion, we submit that Petitioner has now waived any right to contend that the Montana Supreme Court failed to consider the federal question, it contends was raised.

For the above reasons we submit that no federal question was properly raised and that this Court has no jurisdiction to entertain this petition.

STATUTES INVOLVED

No constitutional provisions are involved. The Petitioner recites that *R.C.M. Sec. 53-109 1947* is involved. We submit that said section does not raise a federal question, but for the Court's benefit, *Sec. 53-109* provides in part:

> "*Transfer of title or interest.* (a) Upon a transfer of any title or interest of an owner or owner in or to a motor vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, in the appropriate space provided upon the reverse side of such certificate, and such signature shall be acknowledged before a notary public.
>
> (b) Within ten (10) days thereafter, the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration. together with the information required under section 53-107, to the registrar, who shall file the same

upon receipt thereof and no certificate of ownership and certificate of registration shall be issued by the registrar of motor vehicles until the outstanding certificates are surrendered to that office or their loss established to his reasonable satisfaction.

(c) The provisions of subsection (b) of this section, requiring a transferee to forward the certificate of ownership after endorsement and the certificate of registration to the registrar, shall not apply in the event of the transfer of a motor vehicle to a duly licensed automobile dealer intending to resell such vehicle and who operates the same only for demonstration purposes, but every such dealer shall upon transferring such interest deliver such certificate of ownership and certificate of registration with an application for registration executed by the new owner in accordance with the provisions of section 53-107, and the registrar upon receipt of said certificate of ownership certificate of registration and application for registration, together with the conditional sales contract or other lien, if any, shall issue a new certificate of ownership and certificate of registration together with a statement of any conditional sales contract, mortgage, or other lien as provided in said section 53-107.

(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

The following portion of the Montana Rues of Appellate Civil Procedure is also pertinent:

"Rule 34. *Petitions for Rehearing.* * * * A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive

of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed * * *."

QUESTION PRESENTED

We submit that the sole question presented is whether or not a federal question was properly raised so as to invoke this court's jurisdiction. We will, however, discuss Petitioner's arguments even though the only question presented to the Montana Supreme Court was the validity, construction and enforcement of the three Montana insurance contracts in light of applicable Montana law.

STATEMENT

Glens Falls Insurance Company insured Midland Dodge. On July 15, 1964, William Parker entered into an agreement with Midland Dodge to purchase a 1956 Mercury by signing a "car order". The price of the Mercury was $295.00 plus a $1.00 charge for "license, license transfer title, registration, etc.," for a total of $296.00. Mr. Parker give Midland Dodge $100.00 in cash to apply toward the purchase of the Mercury and traded in another car, leaving a balance due and owing on the 1956 Mercury of $76.00 for which Mr. Parker signed a promissory note. Mr. Parker then drove the Mercury home and retained possession of it until the date of the accident on July 26, 1964. Midland Dodge retained possession of the certificate of title and certifi-

cate of registration on the Mercury from July 15, 1964, until August 2, 1964, after the date of the accident, at which time the same was given to Mr. Parker when he paid the balance due and owing on the promissory note. Midland Dodge never sent in the title as required by *Sec. 53-109(c) R.C.M. 1947.* Instead of transferring the title as required by the Montana law, Midland Dodge retained title to the vehicle even though they had a valid purchase order agreement, a promissory note for the payment of the balance, and had collected $1.00 from Mr. Parker to transfer the title.

ARGUMENT

A. THE MONTANA SUPREME COURT IS NOT BOUND BY THE DECISION OF THE NINTH CIRCUIT.

Petitioner contends that the decision rendered by the Montana Supreme Court is in conflict with the Ninth Circuit Court's opinion in *Colbrese v. National Farmers Union Prop. & Casualty Co.,* (1967) 368 F.2d 425. This however, does not raise a federal question. In the *Colbrese* decision, the federal court interpreted Montana law and in *State ex rel. City of Livingston v. State Water Conservation Board* (1958), 134 Mont. 403 332 P.2d 913, the Montana Supreme Court held that a federal court decision interpreting Montana law is not binding on the state court, and that the interpretation of Montana law is primarily a function to be borne by the state courts.

We therefore submit that there is no merit to the Petitioner's first contention.

B. SECTION 53-109(d) DOES NOT IMPAIR PETITIONER'S RIGHT TO CONTRACT.

The above section was first enacted in 1937 and amended in 1945. The Glens Falls insurance contract with Midland Dodge was entered into many years later. Montana law requires insurance contracts to conform to existing statutes. The effect to be given a prior statute in interpreting a subsequently entered into contract was discussed in *Valier Company v. State* (1959), 123 Mont. 329, 215 P.2d 966, where the court said at p. 973:

> " 'The laws which subsists at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' (citing cases) The above quotation is quoted with approval in City of Philipsburg v. Porter, Mont., 190 P.2d 676, at page 678, wherein is also cited a number of Montana cases to the same effect. (citing cases)"

Petitioner was free to contract with Midland Dodge, but upon doing so it assumed the obligation of entering into a contract which was not violative of *Sec. 53-109.*

C. THE MONTANA STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Glens Falls entered into the insurance contract with

Midland Dodge having full knowledge of *Sec. 53-109* and the interpretation placed upon said provision by the Montana Supreme Court in *Safeco Ins. Co. of America v. Northwestern Ins. Co.* (1963), 142 Mont. 155, 382 P.2d 174. Glens Falls' insured's failure to comply with the statute, which required it to send in the title to the registrar of motor vehicles, cannot now be contended to be a violation of due process. This is especially relevant when you consider that Petitioner's insured charged for transferring the title, but failed to do so.

D. THE DECISION DOES NOT PLACE ANY UNDUE BURDEN UPON THE INSURANCE INDUSTRY INVOLVED IN INTERSTATE COMMERCE.

This contention deserves little, if any, comment. This was a Montana insurance contract to be interpreted in accordance with Montana law. Petitioner's insured chose to ignore the law and as a result must suffer the consequences.

CONCLUSIONS

Respondent first contends that there was no federal question raised and therefore this court has no jurisdiction.

We further contend that all of Petitioner's arguments are without merit.

We therefore respectfully submit that the petition should be denied.

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PROOF OF SERVICE

I, - CHARLES C. COLLINS, one of the attorneys for Respondent State Farm Mutual Automobile Insurance Company herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7 day of April, 1969, I served one copy of the foregoing Brief of Respondent State Farm Mutual Automobile Insurance Company In Opposition for Writ of Certiorari, by mailing copies in duly addressed envelope with first-class postage prepaid, to:

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